belongs in this second class. The admissibility of evidence of habit depends largely on its remoteness. The habit of occasional intoxication is logically relevant. It makes a belief that X was drunk on the particular occasion more likely, but more likely by so little that the evidence is hardly worth the time consumed in hearing it. Hence it is often excluded.[1] Proof of a habit of invariably doing the same thing under circumstances like those of the case at issue is less remote and hence more likely to be admitted. This is most frequently true of acts that are largely mechanical, as mailing letters left in a certain place,[2] or of acts without moral significance, as spelling a word a certain way,[3] and which are therefore the subjects of the strongest habits; or of business transactions, as accepting drafts in writing only,[4] for men are generally more methodical about their business than about other affairs. Since strength of habit depends partly on frequent repetition, that too has a bearing on probative value. Thus the practice of getting drunk every Saturday night might be admitted by a court which would exclude evidence of so doing every New Year's Eve. Again, remoteness varies inversely with the definiteness of the circumstances under which the act is habitually done; for the vaguer these circumstances are the harder it is to say that there is any habit as distinguished from mere coincidence. These matters are all questions of degree; the decisions are by no means uniform; and in each case the discretion of the judge should play a large part.

Once having determined that the habit is competent evidence of the act, the court applies the same rules to evidence of the habit as to evidence of any other relevant fact. A recent Pennsylvania case introduces a further refinement peculiar to this point. *Moyer* v. *Berndt*, 19 Pa. Dist. R. 869 (Pa., C. P., Berks Co.). Following earlier *dicta* [5] it holds that habit is not admissible to prove an act, unless there is also direct evidence of the act, but concedes that it would be admissible to corroborate direct evidence. The use of habit as a substitute for the witness' present recollection may be compared with the use of a contemporary record for the same purpose. In the absence of present recollection, a witness may testify that he did the act because it was his invariable habit to do so, or because he had entered a record of the transaction.[6] The record alone would be kept out by the hearsay rule; but that does not apply to the habit standing alone. Indeed, it is hard to see a reason for the principal decision, unless the habit was such remote evidence that without more no reasonable jury could find that the act was done.[7]

QUO WARRANTO AND MANDAMUS FOR OFFICES AT WILL. — The books contain many conflicting rules regarding jurisdiction to issue the writ of

[1] Kingston *v.* Ft. Wayne, etc., Co., 112 Mich. 40. *Contra*, Smith's Executor *v.* Smith, 67 Vt. 443

[2] Bell *v.* Hagerstown Bank, 7 Gill (Md.) 216.

[3] Brookes *v.* Tichborne, 5 Exch. 929.

[4] Smith *v.* Clark, 12 Ia. 32.

[5] See Meighen *v.* The Bank, 25 Pa. St. 288; Eureka Insurance Co. *v.* Robinson, 56 Pa. St. 256.

[6] Shore *v.* Wiley, 18 Pick. (Mass.) 558.

[7] On very similar facts, the evidence was admitted in Lucas *v.* Novosilieski, 1 Esp. 296.

mandamus, several of which are considered in a recent Irish case. A board of justices had the duty of electing a clerk, removable at its pleasure. Certain ineligible justices voted, converting what would otherwise have been a tie between A and B into a plurality for A, and A entered upon the office. On B's application, the court refused to issue a writ of *quo warranto* against A, but granted a *mandamus* to compel the board to hold another election. *The King (Roycroft)* v. *Justices of Schull, etc.*, [1910] 2 Ir. 601.

The usual remedy for a person wrongfully excluded from office by a rival candidate is *quo warranto*.[1] Many cases, however, have held that where any incumbent can be removed at the pleasure of the appointing power and a new officer appointed, a judgment of ouster may easily be frustrated, and therefore should not be given.[2] Assume that three persons have the right to elect an officer removable at their pleasure, that two of these vote for B and one for A, and two other persons, having no right to do so, vote for A and A is declared elected. One of the rightful voters could probably by *quo warranto* proceedings oust the intruders from the body,[3] and then the three proper voters could remove A and elect B. While it seems undesirable that B's only hope should be that this course will be taken, nevertheless, it is a hard and fast rule that *quo warranto* will not issue in disputes concerning offices at will.[4]

It is sometimes said that *mandamus* should be granted in disputes concerning offices where no other adequate remedy is available.[5] Ordinarily *mandamus* is a writ of command directing the performance of a duty.[6] It often issues to compel a board to hold an election.[7] But where the office is occupied, the objection is raised that such a command would merely result in putting two persons in office, both claiming title, and that it is not the function of *mandamus* proceedings to settle title.[8] On this ground, perhaps, some courts would have refused *mandamus* even in cases where *quo warranto* would not issue.[9] Courts have, however, issued *mandamus* where they were satisfied that the election was void or merely colorable;[10] but it is hard to say how far they are willing to go into the question of the validity of the election.[11] Several states have solved the difficulty by settling the whole dispute in *mandamus* proceedings.[12] To do this they have occasionally disregarded the generally accepted rule that *mandamus* should not issue where there is another remedy, because they consider the delay incidental to first bringing a petition for *quo warranto*

[1] Darley *v.* The Queen, 12 Cl. & F. 520; The State *v.* Stewart, 6 Houst. (Del.) 359.
[2] Bradley *v.* Sylvester, 25 L. T. N. S. 459; The Queen *v.* Bayly, [1898] 2 Ir. 335.
[3] See HIGH, EXTRAORDINARY LEGAL REMEDIES, § 630.
[4] See cases under note 2, *supra*.
[5] See The Queen *v.* Hertford College, 3 Q. B. D. 693, 704–705; Harwood *v.* Marshall, 9 Md. 83, 98.
[6] See HIGH, EXTRAORDINARY LEGAL REMEDIES, § 1.
[7] The King *v.* Corporation of Bedford, 1 East 79; Atty.-Gen. *v.* City Council, 111 Mass. 90.
[8] See The King *v.* Beer, [1903] 2 K. B. 693; Commonwealth *v.* County Commissioners, 5 Rawle (Pa.) 75.
[9] See The King *v.* Stoke Damerel, 5 A. & E. 584, 591.
[10] See The Queen *v.* Gov't Stock Investment Co., 3 Q. B. D. 442; Commonwealth *v.* County Commissioners, *supra*, 77.
[11] See SHORTT, CRIMINAL INFORMATIONS, 122.
[12] Keough *v.* Holyoke, 156 Mass. 403; Lawrence *v.* Hanley, 84 Mich. 399; Harwood *v.* Marshall, *supra*.

as fatal to its adequacy.[13] Although settling the whole matter necessitates giving a judgment in the nature of ouster against the incumbent,[14] this is open to no substantial objection if all the parties interested have had a chance to be heard.[15]

Some authorities have refused to issue the writ of *mandamus* for offices at will; [16] and, indeed, the reasons for refusing *quo warranto* apply equally to *mandamus*. It is consequently curious that the court in the principal case found refuge in *mandamus*, but as all the parties had been in court and the election of a person other than the incumbent would amount to his amotion, the remedy was proper and effective.[17] Courts should have a wide field of discretion over the extraordinary legal remedies, and it is unfortunate that artificial rules have so often deprived them of jurisdiction.[18]

THE NATURE OF THE RIGHT IN A DEAD BODY. — The common law of England recognizes no property rights in a dead body.[1] Thus, while to steal the coffin or winding sheet of the dead is larceny, it is not so to steal the corpse itself.[2] And there are indications that even the relatives' right to possession of the corpse for purposes of burial has not always been adequately protected.[3] In England, however, all questions relative to the disposition of dead bodies were under ecclesiastical law; [4] hence English cases are not very helpful in a country having no ecclesiastical courts, for there rights in dead bodies must be protected, if at all, by civil remedies.[5] The legal duty of the surviving spouse or next of kin to bury the deceased predicates a legal right to do so, and it is well established in our law that an action lies for wrongfully detaining a corpse awaiting burial,[6] or for mutilation of it by unauthorized autopsy,[7] or otherwise.[8] Moreover, the legal right being recognized, courts of equity will act where the remedy at law is inadequate. For example, whether or not a corpse be regarded as becoming on interment a part of the soil in which it lies,[9] equitable remedies alone can properly protect whatever rights exist in it thereafter.[10]

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[13] See Luce *v.* Board of Examiners, 153 Mass. 108, 110; Lawrence *v.* Hanley, *supra*, 403.

[14] See The Queen *v.* Hertford College, 2 Q. B. D. 590, 605; Keough *v.* Holyoke, *supra*, 408.

[15] See Brown *v.* Bragunier, 79 Md. 234, 242; Harwood *v.* Marshall, *supra*, 100.

[16] Rex *v.* Wheeler, 3 Keb. 360; The State *v.* Champlin, 2 Bailey's Law (S. C.) 220. See SHORTT, CRIMINAL INFORMATIONS, 275.

[17] *Accord*, *In re* Barlow, 30 L. J. Q. B. 271; Regina *v.* Strabane Urban Dist., 35 Ir. L. T. Rep. 12.

[18] See *In re* Barlow, *supra*, 271.

[1] See 3 COKE'S INSTITUTES, 203; 2 BL. COMM. 429; Regina *v.* Sharpe, 7 Cox C. C. 214.

[2] Haynes's Case, 12 Coke 113.

[3] See 9 SOL. J. 3, describing instances in which corpses had been successfully withheld from the relatives for purposes of blackmail.

[4] *Cf.* Kemp *v.* Wickes, 3 Phillim. 264.

[5] See Law of Burial, 4 Bradf. Surr. (N. Y.) 503.

[6] Renihan *v.* Wright, 125 Ind. 536.

[7] Koerber *v.* Patek, 123 Wis. 453; Burney *v.* Children's Hospital, 169 Mass. 57.

[8] Hockenhammer *v.* Lexington & Eastern R. Co., 24 Ky. L. Rep. 2383; Louisville & Nashville R. Co. *v.* Wilson, 123 Ga. 62.

[9] Meagher *v.* Driscoll, 99 Mass. 281.

[10] Pierce *v.* Proprietors of Swan Point Cemetery, 10 R. I. 227; Wilson *v.* Read, 74 N. H. 322.